
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street N.W.
Washington, D.C. 20036

DATE ISSUED: December 12, 1989
CASE NO. 89-ERA-20

In the matter of:

MICHAEL SAMODUROV,
Complainant

v.

NIAGARA MOHAWK POWER CORPORATION
AND
GENERAL PHYSICS CORPORATION,

Respondents

CASE NO. 89-ERA-26
In the matter of:

MICHAEL SAMODUROV,
Complainant

v.

NIAGARA MOHAWK POWER CORPORATION,
Respondent

Appearances:

DAVID K. COLAPINTO, Esquire
STEPHEN M. KOHN, Esquire
For Complainant

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ROBERT A. LaBERGE, Esquire
For Niagara Mohawk Power Corporation

RICHARD J. HAFETS, Esquire
MICHAEL S. KUN, Esquire
KENNETH L. CRAWFORD, Esquire
For General Physics Corporation

Before: JULIUS A. JOHNSON
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

I. Introduction

These matters stem from complaints under Section 210 of the Energy Reorganization Act of 1974 ("ERA" or "Act"), 42 U.S.C. § 5851 and related regulations at 29 C.F.R. Part 24. These provisions protect employees against discrimination for attempting to carry out the purposes of the ERA or of the Atomic Energy Act of 1954, as amended, 42 U.S.A. § 2011 *et. seq*. The Secretary of Labor is empowered to investigate and determine "whistle blower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are discharged or otherwise discriminated against in the terms and conditions of employment for their actions in fulfilling safety or other requirements of the NRC for the construction and operation of nuclear plants.

By complaint filed October 5, 1988, Michael Samodurov alleged that Niagara Mohawk Power Corporation ("Niagara Mohawk") and General 'Physics Corporation ("General Physics") violated Section 210 of the ERA by engaging in "blacklisting" which prevented him from obtaining employment at General Physics. Title 29 C.F.R. § 24.2(b) provides:

> Any person is deemed to have violated the particular federal law and these regulations if such person intimidates, threatens, restrains, coerces, blacklists, discharges, or in any other manner discriminates against any employee [who has engaged, or is about to engage, in such protected activities under the Act or other specified federal statute as (1) commencing a proceeding, (2) testifying in a proceeding, or (3) assisting or participating in any manner in such a proceeding or other action related to implementing the statute.]

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A U.S. Department of Labor investigation concluded on February 13, 1989 that the complaint of blacklisting was without merit. Complainant appealed the findings to the office of Administrative Law Judges. A formal hearing was held on April 27, 1989 in

Syracuse, New York. At the beginning of the hearing, Niagara Mohawk made a motion to dismiss the complaints with prejudice in two originally consolidated cases, only the first of which, the instant case, involved General Physics as a co-respondent: 89 ERA 20, *Samodurov v. Niagara Mohawk Power Corporation and General Physics Corporation*; 89 ERA 26, *Samodurov v. Niagara Mohawk Power Corporation* (based on a second complaint filed February 15, 1989 solely against Niagara Mohawk). An order dismissing with prejudice the complaints against Niagara Mohawk in the two cases was issued May 19, 1989 (Appendix) pursuant to a settlement agreement by the parties which embodied no admission of liability by Niagara Mohawk. (Hrg. Tr. 5-6)

The single issue for determination between the remaining parties is whether General Physics, now the sole respondent in this proceeding, engaged in any blacklisting against complainant in violation of Section 210 of the Act. General Physics wholly denies any acts that could be construed as a violation of this Section. Based on the evidence submitted at the formal hearing arid the post-hearing briefs and memoranda filed by July 14, 1989, a determination is made that the claim must be denied.

II. Evidence

Complainant Michael Samodurov worked as a contractor through Nuclear Energy Services Corporation ("NES") for Niagara Mohawk at the Nine Mile Point One ("Nine Mile") nuclear power facility. Complainant testified that he was a sole proprietor working as an independent contractor through NES. (T 99)[1] Complainant began his employment at Nine Mile on February 1, 1988 and was assigned to the in-service-inspection department ("ISI"). At the hearing, complainant testified that he assumed a supervisory position for a group of technical writers who were responsible for producing ISI test procedures. Both Nine Mile and the work which complainant performed were regulated by the

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Nuclear Regulatory Commission. (T 39)

Complainant stated that he had expressed concern to his supervisor, Dick Shelton, on three separate occasions about deficiencies which he perceived in Nine Mile's quality assurance programs. Quality assurance programs are the source of implementing functions or activities at nuclear plants. Complainant testified that "it tells you not what to do, but how you do what you do. " According to complainant, Shelton and another supervisor, Lon Ludwig, accused him of trying to "expand the market for NES employees" at Nine Mile when he voiced his opinions. (T 43)

Prior to his employment at Nine Mile, complainant worked as an NRC-licensed reactor operator in the Calvert Cliffs project of the Baltimore Gas and Electric Company from August 1981 through September 1985. During this time, complainant became acquainted with Robert Madden, with whom he worked the same shift. (T 26, 46)

After leaving the Calvert Cliffs project, complainant and Madden saw each other again in 1988 at a Fourth of July parade in Oswego, New York, but did not have occasion to speak. (T 47) At this time, Madden was working for General Physics at the James A. Fitzpatrick Power Plant ("Fitzpatrick") in Oswego. In his capacity as a staff specialist at Fitzpatrick, Madden conducted training classes for inspectors. Mr. Madden testified that he had no authority to hire any personnel, and more specifically, subcontractors, during his tenure at General Physics. (T 183)

On July 6, 1988, Madden telephoned complainant and the two men discussed what each had been doing since they had last worked together. Complainant told Madden that his contract at Niagara Mohawk was due to expire shortly. (T 184-185) Upon further discussion, Madden suggested that complainant send him a resume which he would direct to the appropriate persons at General Physics. (T 92, 185) Following this conversation, complainant never sent Madden a copy of his resume. (T 185)

There is some dispute over whether complainant mentioned in the course of the July 6th conversation, any safety-related concerns that he held regarding the Nine Mile plant. Complainant recalled informing Madden "about the problems" that he and the ISI pressure group "were experiencing, not too technical, but enough to give him [Madden) the feeling there was some serious

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problems at Nine Mile Point One." (T 47) Madden testified, in contradiction to this, that complainant did not make at any time any disclosures about possible safety problems at Nine Mile. Madden did not recall complainant voicing any specific complaints about his work at Nine Mile. (T 185, 199)

Complainant testified that the work that he had supervised at Nine Mile had led to the issuance of a licensing event report ("LER"), a form submitted by a utility to the Nuclear Regulatory Commission as notification of operating problems. (T 40) On cross examination, complainant noted that he had not told Mr. Madden in the the July 6, 1988 telephone conversation that he had filed any LERs with the NRC against Niagara Mohawk. (T 88) Mr. Madden also testified that complainant had made no mention of any safety-related complaints against Niagara Mohawk during this conversation. (T 185) Complainant did not offer evidence of any LERs which he may have submitted to the NRC regarding his work at Nine Mile.

Also, there is conflicting testimony regarding the discussion of employment opportunities at General Physics during the July 6, 1988 conversation. According to complainant, he and Madden "compared opportunities," and Madden explained to him that "in the training department they were looking for senior reactor operators and reactor operators." (T 48) However, Madden testified that he and complainant had never discussed "specific opportunities at General Physics." (T 185)

In his testimony, Madden stated that, in a conversation with Margaret Haas, an employee of NES, he had learned about "some rumors around the office of allegations concerning time sheet discrepancies" against complainant. Madden recalled that he had spoken to Ms. Haas on the night of July 28, 1988, after a department meeting. (T 186)

Complainant testified that he had telephoned Madden on August 16, 1988. (T 53) To support this contention, complainant offered a page from his daily planner for the date August 16, 1988, which contained an entry indicating a telephone call to Mr. Madden. (C 5) In his testimony, complainant stated that he and Madden had spoken "primarily about work," and that he had informed Madden that he would be finishing his work at Nine Mile shortly and that he "wanted to actively pursue a position within G.P.C." (General Physics Corporation). (T 59) Complainant

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added that he had asked Madden for a "contact" and had been "informed of two people ... John Stanton and Larry Lukens." (T 59) On the other hand, Madden testified that he was "absolutely sure" there had been no telephone conversation between him and complainant on August 16, 1988. (T 200) Madden stated that he had given complainant the names of Stanton and Lukens during the July 6, 1988 conversation. (T 201)

On August 16, 1988, Madden called another General Physics employee, Gordon Hawks, who worked at Nine Mile, and asked if he knew complainant. (T 201) At this time, Mr. Hawks was a senior specialist at Nine Mile. (C 13(2)) Hawks told Madden that he did not know complainant but would try to get some information on the rumors circulating about complainant's alleged time sheet discrepancies. (T 188, 201) In his deposition, Hawks stated that he contacted Dick Shelton, complainant's supervisor at Nine Mile on August 16, 1988 to inquire about complainant's employment at Nine Mile. According to Hawks, Shelton informed him that complainant's "work was not that good and that there were suspicions of time sheet problems." This was the only conversation between Hawks and Shelton regarding complainant. (C 13(5-6))

After Hawks relayed to Madden the information that Shelton had given him regarding complainant, Hawks and Madden did not contact each other again. (C 13(6)) In addition, Madden testified that he had no knowledge of any other conversations about complainant between individuals at Niagara Mohawk and General Physics. (T 189) Moreover, Madden maintained categorically that he had told no one in a hiring capacity at General Physics about the information he had received from Mr. Hawks. (T 189-190)

On September 6, 1988, Madden telephoned complainant to discuss the information that he had acquired about the time sheets. (T 190) Complainant taped this conversation without the consent or knowledge of Mr. Madden. (T 82-83) The transcript of the telephone conversation revealed that Madden told complainant initially that "it's a no go . . . until the situation has been straightened out." (C 12(2)) Madden stated that the only person that he had spoken to at General Physics about complainant was his supervisor,

Larry Lukens, a department director. (C 12(12)) The taped conversation showed that Madden, believing that complainant would be contacting General Physics, had asked

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Lukens to let him talk to complainant first because Madden had some information that he wanted to discuss. (C 12(12)) On cross examination, Madden denied that he had discussed complainant's situation with Lukens any further than asking for the opportunity to speak to complainant before any contact between complainant and General Physics was made. (T 192-93) Madden stated that he had told no one at General Physics, notably, no one in a hiring capacity, about the information that he had received from Nine Mile employee Hawks. (T 189-190) Despite complainant's belief that Madden had discussed the allegations of complainant's time sheet discrepancies with others at General Physics, there was no evidence to support this contention. No one in a hiring capacity for General Physics was deposed or testified at the instant hearing. Although three other General Physics employees were actually available as witnesses, Madden was the only such employee respondent - or complainant, for that matter - deemed it necessary to call to examine. (T 8)

Prior to the taped telephone conversation of September 6, complainant had contacted a Mr. Rhodes and Mr. Paul Weeks at General Physics' home office in Columbia, Maryland concerning employment opportunities. (T 65, 191) In the taped conversation, Madden had encouraged complainant to continue to pursue this course and told him to "stay in contact with these people ... and if they want to set up an interview and go through the process, then that's totally up to them." (C 12(9))

Complainant stressed the importance of Madden's "no go" comment made in the September 6 conversation as an indication that he would not be considered favorably for a position at General Physics. (T 177; C 12(2)) Indeed, madden's comment forms the core of the complaint against General Physics concerning the use of an "informal information gathering" and "informal hiring process." (T 177) At the hearing, complainant testified that Madden had told him during this call that:

> [H]e received some derogatory comments about me and regarding time sheets ... And after hearing that, he informed me that it was no go with G.P.C., that he could no longer, in essence, pursue on my part any employment or contract position for G.P.C. (T 68)

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In Madden's testimony, he denied that he told complainant that his employment prospects with General Physics were "no go" because of the difficulties with Niagara Mohawk. (T 204) While Madden did acknowledge that he had told complainant that the relationship between General Physics and Niagara Mohawk was "sensitive" with regard to General Physics, and that General Physics might be reluctant to hire someone who

might cause a problem with a client, he stressed that his comments resulted from "mere speculation on his part." Madden stated that Niagara Mohawk was a client of General Physics at the time of the September 6 conversation. (T 205)

Madden stated at the hearing that complainant had told him that the time sheet discrepancies were "unsubstantiated." Both the transcript of Madden's deposition as well as the transcript of the September telephone call indicated that complainant had not told him that the rumors were unsubstantiated. (T 204)

The transcript of the September 6 telephone conversation indicated that complainant advised Madden to "feel free" to disclose any information that he had gathered regarding complainant's employment at Niagara Mohawk if General Physics, home office were to inquire. (C 12(12)) Madden maintained throughout the hearing that he did not act upon this authorization by complainant. (T 203, 206)

On September 7, 1988, the day after the taped conversation with Madden, complainant sent copies of his resume to Diane Leviski and Paul Weeks at General Physics, home office in Columbia, Maryland. (GP 1, 2, T 100, 109) The cover letter that complainant included with his resume inquired about "subcontractor opportunities" on behalf of his own company,, Nucad, Inc. (GP 1, GP 2, T 101, 109) At the hearing, complainant explained that he had incorporated his sole proprietorship, "Nucad," in March 1988 while he was working for Niagara Mohawk, and had conducted business after October 1, 1988 as an employee of Nucad, Inc. (T 142)

Ms. Leviski acknowledged complainant's resume with a letter dated September 15, 1988 which informed him that, in accordance with General Physics' "standard procedures," complainant's resume had been "forwarded to appropriate department heads for review." (GP 3) Complainant testified that Leviski's letter had also stated that it usually took General Physics three to four weeks

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to process an application. (GP 3, T 114) Leviski's letter notified complainant that if General Physics did not contact him after this three to four week review process, then it was "probable that General Physics did not have an immediate or near-term need" for his services. (GP 3) Through General Physics, weekly resume status report, a summary of complainant's resume, along with those of other applicants, was sent to department heads. (GP 9(8)) No further action was taken by respondent on complainant's application.

Complainant asserted that General Physic's "apparent reliance on an informal reference check rather than going through normal channels, that is, through the complainant's employer, NES, was inherently discriminatory conduct." (T 107) At the hearing, General Physics responded to this point by directing attention to the content of complainant's resume which he had sent to Ms. Leviski and Mr. Weeks in September. (T 107) This resume did not mention complainant's recent employment at NES at all, although it did

indicate that he had worked as a site supervisor at Niagara Mohawk's Nine Mile facility. (GP 1) Based upon this information, General Physics maintained that neither Leviski nor Weeks would have known to contact NES for a reference. Complainant explained that "as a matter of procedure," he would offer a list of references but only after a potential employer had shown interest in him. (T 108) NES appeared on the resume at issue only once, in an entry relating to employment dated 1986. (T 108)

According to complainant, a typographical error on his resume caused the date for his employment at Niagara Mohawk to read "September 1988 to present," rather than that he had in fact worked there since February 1, 1988. (GP 1(2), T 108) General Physics stated that since its home office acknowledged receipt of complainant's resume containing this error on September 15, there would have been a reasonable inference by Mr. Weeks and Ms. Leviski that complainant had just begun employment at Nine Mile. (T 108) At the hearing, respondent argued that, based on complainant's resume, it had every reason to believe that complainant was currently employed by Niagara Mohawk. (T 112) Both complainant and Madden testified that Niagara Mohawk was a client of General Physics. (T 112, 205) Complainant was questioned by respondent's counsel about his knowledge of industry policy regarding employees of clients:

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> Q. Do you know whether or not General Physics has any policy regarding the hiring of employees of clients, existing clients of General Physics? In other words, do you know whether or not General Physics has a policy that Bays they are not going to go and steal a client's employees?
>
> A. I do not know whether GPC has a policy for that.
>
> Q. Have you ever heard of that type of policy in the industry?
>
> A. Yes. Just a consideration contractors have for their clients. (T 112-113)

In early October, General Physics sent complainant an announcement of employment opportunities listing quality assurance positions that would be available in January 1989. (GP 4, T 115) At this time, complainant was requested to send an updated resume to General Physics. (T 115) Complainant responded promptly by sending General Physics an updated resume in mid- October. (C 2, T 116) This version of complainant's resume correctly indicated that he had worked at Nine Mile since February 1988, rather than September 1988, as incorrectly indicated previously, but it still did not mention any relationship with NES. (C 2) After sending respondent an updated resume in mid-October, complainant stated that there was no further contact between himself and General Physics. (T 117)

Complainant testified that approximately three weeks after he sent his updated resume to respondent, he believed that his application for a position had been rejected. (T 117) According to complainant, this would have been sometime in early November. (T 117) There is no formal notice or other evidence of rejection by respondent in the record.

After complainant filed the instant complaint on October 5, 1988 which alleged that "on September 6, 1988, NiMo (Niagara Mohawk) blacklisted and prevented Mr. Samodurov from obtaining employment with General Physics Corporation," he filed a second complaint against Niagara Mohawk which involved an offer of employment from Jersey Central Power and Light Company in January 1989. (T 118, 135) General Physics was not a party to this complaint, which together with the original complaint against Niagara Mohawk was settled and dismissed, as stated

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previously. At the hearing, complainant agreed that "to the best of his knowledge" General Physics had nothing to do with his not receiving offers for the "many positions" to which he had applied between September 6, 1988 and March 13, 1989, the time that he began employment in a current position. (T 134, 135)

III. Disposition

A. Legal Requirements

Section 210 of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, protects employees who have been fired or discriminated against because they have "testified" "given evidence" or "brought suit" under the ERA or the Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2011 *et. seq*.

To establish a *prima facie* case of unlawful discrimination, a claimant must prove "(1) that the party charged with discrimination is an employer subject to the Act; (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; and (3) that the alleged discrimination arose because the employee participated in an NRC proceeding under the Energy Reorganization Act of 1974 or the Atomic Energy Act of 1954." *See Deford v. Secretary of Labor*, 700 F. 2d 281, 286 (6th Cir. 1983).

The legislative history of Section 5851 specifically states that he "whistle blower" provision in the ERA is "substantially identical" to the provisions in the Clean Air Act (42 U.S.C. § 7622) and the Federal Water Pollution Control Act(33 U.S.C. § 1367). 1978 U.S. CODE CONG. & ADMIN. NEWS 7303. Other similar whistle blower provisions are contained in the Toxic Substances Control Act (15 U.S.C. § 2622); the Safe Water Drinking Act (42 U.S.C. § 300J-9(i)); and the Solid Waste Disposal Act (42 U.S.C. § 6971). This group of whistle blower statutes is patterned after the National Labor Management Act (29 U.S.C. § 158(a)(4)) and the Mine and Safety Health Act (30 U.S.C. § 815(c)). The legislative history indicates that while the whistle blower provision in the ERA would safeguard the rights of employees, it should not encourage employees to frivolously allege violations since the employee would have to pay the cost of the proceeding unless the violation is proved. 1978 U.S. CODE CONG. & ADMIN. NEWS 7303, 7304.

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There is no dispute between the parties that respondent General Physics is an operator duly licensed by the NRC and therefore a covered employer under the ERA.

An approach to resolution of the instant matter under the Act requires, initially, defining an employee, determining the existence of any protected activity, and, ultimately, construing what is apparently alleged as unlawful discrimination by this respondent.

1. Employee

The term "employee" is not defined by the ERA and no significant body of case law has developed to determine when the employer-employee relationship is established for the purposes of the ERA. Complainant argues that "employee" must be construed broadly for the purposes of the ERA in order to effectuate the main goal of Section 210: encouraging the of voicing safety concerns without fear of reprisals. Respondent maintains that the language of the ERA, as well as the legislative intent behind Section 210 and other whistleblower provisions, expressly precludes from protection an individual holding complainant's status of independent contractor.

Complainant relies on the holding of an administrative law judge in *Young v. Hinds*, 86 ERA 11 (April 9, 1986), to support his contention that, by analogy to the broad interpretation of "employee" under the National Labor Relations Act ("NLRA"), 28 U.S.C. § 158(a)(4), an equally broad reading of "employee" under the ERA would be correct. In *Young*, "employee" was read under the ERA to include "prospective employees." *Supra*, slip opinion, pp. 5-6.

However, in *Young*, the judge concluded that, "in reality, complainant's status was not that of a prospective employee, but that of an employee." Supra, slip op. at p. 6 (emphasis added):

> [C]omplainant was under the supervision and control of the respondent while he was at the power plant; he was obligated to attend the training session and was compensated for the time that he was at the plant; and finally, respondent deducted Social Security and with- holding taxes from his paycheck. *Supra*, slip opinion, pp. 6-7.

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Accordingly, the judge found the complainant in *Young* to hold "employee" status for the purposes of the ERA.

In the instant case, complainant sent an unsolicited resume to General Physics, but unlike the complainant in *Young*, Mr. Samodurov was never hired nor asked to report to

the power plant and begin training, much less receive any form of compensation from General Physics. Thus, complainant was never an "employee, for General Physics under this strict definition.

Moreover, as complainant's testimony indicated, the cover letters included with the resumes that he sent to General Physics expressed his interest in pursuing "subcontractor opportunities" on behalf of his own company, Nucad, Inc. (T 101) These cover letters, dated September 6, 1988, which were sent to both Ms. Leviski and Mr. Weeks, were signed by complainant on behalf of Nucad, Inc. (GP 1, GP 2) When asked to clarify his employment relationship with Niagara Mohawk, complainant testified that he had been a "sole proprietor working as an independent contractor through NES." (T 99) Thus, given complainant's previous work history as an independent contractor with Niagara Mohawk as well as complainant's own testimony and the terms "subcontractor opportunities" in his cover letters, complainant clearly falls outside the scope of "employee" for the purposes of the ERA.

General Physics relies upon the NLRA to bolster its argument that complainant, as an independent contractor, was expressly excluded by the provisions of the NLRA, specifically, 29 U.S.C. § 152(3), which defines "employee" for the purposes of the NLRA and excludes from coverage "anyone having the status of an independent contractor."

Respondent asserts that there has been a long history of legally distinguishing between an individual in an employer- employee relationship and one involved in an independent, entrepreneurial capacity. To illustrate this point, respondent notes that, not only does the NLRA expressly exclude independent contractors from its coverage, but other federal statutes have also recognized this distinction, namely: Title VII of the Civil Rights Act; the Fair Labor Standards Act; and the Age Discrimination in Employment Act. (Brief of General Physics, pp. 11-12)

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Although complainant maintained that "employee" under Section 210 should be given a broad reading to encourage and protect those "whistle blowers" who may not fit the literal definition of "employee," categorizing an independent contractor whose unsolicited resume was rejected as a protected "employee" offends both the ERA itself as well as the legislative intent behind Section 210 and the other federal whistle blower provisions.

Even if complainant had not been an independent contractor, any "relationship" that he might have had with General Physics was most tenuous, at best. Here, complainant had simply expressed interest in employment with General Physics through his informal conversations with Mr. Madden and his sending his unsolicited resume to respondent's home office. There was no evidence that there was a position available at the time of complainant's initial sending of his resume in September, nor was there any encouragement in any way by respondent for him to apply for a position. At the time of

his application for employment at General Physics, complainant represented himself as an independent contractor and had been employed in that capacity with his previous employer, Niagara Mohawk.

The weight of the evidence clearly indicates that complainant was not an "employee" for the purposes of Section 210.

2. Protected Activity

Section 210 prohibits an employer from discriminating against an employee on the basis of certain "protected activities." Complainant argues that his reporting of safety concerns to Nine Mile management during his employment at Niagara Mohawk constituted "protected activity. " Urging a broad reading of the Section, complainant asserts that he was not required to report concerns to the NRC, but that his complaints to the Nine Mile management were sufficient to establish "protected activity. " In opposition, General Physics denies the existence of any "protected activity" by complainant's failure to show that he had engaged in any of the protected acts under the Section.

The federal circuit courts of appeals are in conflict with regard to the scope of "protected activity" under Section 5851. The Ninth Circuit in *Mackowiak v. University Nuclear Systems, Inc.*, 735 F. 2d 1159 (9th Cir. 1984) held that the filing of

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internal quality control reports is protected activity under Section 5851. There, the rationale was based on the perceived similarities between the provisions of the Mine Health and Safety Act, 30 U.S.C. § 820(b)(1), and Section 5851. In *Kansas Gas & Electric Co. v. Brock*, 780 F. 2d 1505, 1513 (10th Cir. 1985), *cert. denied*, 106 S. Ct. 3311 (1986), the Tenth Circuit believed "the construction given to Section 5851 by the *Mackowiak* court accurately reflects the intent of Congress." It found that aggressive performance of inspections by nuclear power quality control inspectors was protected activity. *See also*, *Consolidated Edison Co. of New York v. Donovan*, 673 F. 2d 61 (2d Cir. 1982).

By contrast, in *Brown & Root, Inc. v. Donovan*, 747 F. 2d 1029 (5th Cir. 1984), the Fifth Circuit held that the filing of an intracorporate quality control report was not protected by Section 5851. The Fifth Circuit reasoned that Section 5851 could not be compared to the Mine Health and Safety Act, because the latter "contains language expressly protecting employees filing internal complaints." *Supra* at 1034. The Fifth Circuit concluded that "employee conduct which does not involve the employee's contact or involvement with a competent organ of government is not protected under Section 5851.11 *Supra* at 1036.

In the instant case, there was no evidence that complainant ever pursued any safety concerns during his tenure at Nine Mile, only his testimony that he had expressed some perceived problems to his immediate supervisors. There was no evidence that complainant ever filed a formal complaint with the NRC regarding these problems. Nor was there evidence submitted that complainant ever filed any internal safety complaints with supervisory personnel at Niagara Mohawk. Complainant argued that General Physics had somehow learned of these complaints to Nine Mile personnel, and based upon this, had engaged in activities proscribed by Section 210. Other than complainant's own testimony, no evidence was offered at the hearing to show that General Physics ever had knowledge of complainant's safety concerns, and, even so, its mere knowledge would hardly suffice to transform the nature of complainant's own acts - or the lack of them - for purposes of the Act.

Accordingly, the complainant's testimony and the weight of the evidence are wholly insufficient to show, let alone prove,

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that he was engaged in "protected activities" contemplated by Section 210.

3. Discriminatory Action

Even assuming complainant could bear his threshold burdens, no evidence has been offered to demonstrate that General Physics has engaged in any unlawful discrimination or apparent "blacklisting" activity in violation of Section 210. The crux of complainant's case against respondent is clear:

> The reason G.P.C. was brought in is because one of the employees [Madden] engaged in ... an informal hiring procedure, obtained information from his supervisor. On the basis of this informal information-gathering, it was a no go, and [he] communicated that information to Mr. Samodurov. That is the incident, September 6th, 1988. ... That is what is being contested here.(T 177)

As noted earlier, no General Physics employees who had authority in the hiring process were either deposed or called to testify as to the extent of knowledge that General Physics held concerning complainant's safety complaints. Madden, the only employee of respondent to testify, did nothing more than assist the efforts of a friend to obtain other employment. Moreover, for all that the evidence shows, complainant's unsolicited resume was treated in normal course by respondent, like the other resumes at the time, that is, by circulation to department heads, with the indication to complainant that any favorable action would likely be taken within three or four weeks - a period of time scarcely expiring before complainant filed the instant complaint. Some indication of the disposition of respondent toward complainant might be gleaned from the fact that respondent, solely in response to complainant's application and within a few weeks of it, should send him, unsolicitedly, an announcement of its employment opportunities

available in early January 1989. Based on these simple facts, there is no evidence of unlawful discrimination against complainant, cognizable under the Act.

B. Summary of Showings

Complainant cannot be found to have been an "employee" for

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the purposes of the Act because he was an independent contractor seeking employment opportunities on behalf of his own sole proprietorship when he sent his resume to General Physics. Even if the evidence had shown that complainant had been a "prospective employee" and a liberal reading of the definition of "employee" was used under the Act to include complainant in the protected class, his claim under Section 210 would still fail. Complainant did not engage in any form of "protected activity." As the Fifth Circuit found in *Brown & Root*, there was no evidence of any official complaints submitted to the NRC. Even under the more expansive interpretation of the Ninth and Tenth Circuit cases, where internal quality complaints were construed to be "protected activity," the evidence in the instant case still fails to support a claim.

Other than complainant's own testimony, there was no evidence that General Physics was in any way aware of the safety concerns that complainant might have voiced to his Niagara Mohawk supervisors. The compelling evidence shows that complainant's opportunities for employment, although unavailing with General Physics itself, were unaffected by anything this respondent could be regarded as having done.

The weight of the evidence overwhelms complainant's efforts to exploit the willing assistance of a friend by construing an informal telephone conversation, which complainant surreptitiously taped, as some invidious element of his later perceived blacklisting. Complainant's attempts to disprove Madden's testimony and question Madden's motives in his actions did more to betray the substance of this complaint than to affect the credibility of this witness-friend.

Moreover, for all that the evidence shows, nothing but the "normal channels" were followed in consideration of an unsolicited resume received at a time when this respondent could rightfully believe that an applicant had only begun to work for a client company the same month - an applicant whose hiring under such circumstances would have been, even by complainant's own acknowledgment, contrary to the conventional respect shown by those in the nuclear power industry.

Given the potential severity of the consequences caused by unsafe nuclear power plant operations, clearly, individuals who attempt to bring dangerous conditions to light should not fear

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discrimination or dismissal for their actions. While complainant correctly urges a liberal reading of Section 210 to ensure that individuals who "blow the whistle" on potential safety violations in the nuclear industry are protected from reprisal from their employers, the facts of complainant's case hardly require invoking this protection.

Moreover, the foreseeable consequences to a merely prospective employer, such as this respondent, would be catastrophic if the circumstances here should be allowed to prevail for any disappointed applicant seeking employment and alleging, without any real evidence, a discriminatory act or practice - which is no more to be discountenanced than the prosecution of a complaint without merit.

C. Conclusion

Complainant has failed to make a *prima facie* showing in support of his complaint alleging violation of the Act by respondent. The total evidence fails to show any such violation and therefore the complaint should be denied.

IV. Order

A. The complaint against General Physics Corporation in 89 ERA 20 is denied.

B. The complaints against Niagara Mohawk Power Corporation in 89 ERA 20 and 89 ERA 26 are dismissed with prejudice, as of May 19, 1989.

JULIUS A. JOHNSON
Administrative Law Judge

Washington, D.C.

[ENDNOTES]

[1]Abbreviations referring to the record are the following: Hearing transcript, T; Complainant's Exhibits, C; Respondent's Exhibits (General Physics), GP. (The parenthetical number following the exhibit number is to the exact page in that particular party's exhibit.)